83-1256

No.

In The
Supreme Court of the United States

OCTOBER TERM: 1983

G. Harold KING, Jr., Appellant

Petitioner

v.

CHARLES N. MALONE, Trustee

Appellee
Defendant

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

Petition of
G. HAROLD KING, JR.
Petitioner-Appellant,
for a Writ of Certiorari

Respectfully submitted
BY ATTORNEY
FRANZ JOSEPH BADDOCK
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THE QUESTIONS PRESENTED FOR REVIEW

(1) Can a bankruptcy court circumvent 11 U.S.C. 327 (a), the purpose of which is amplified by Bankruptcy Rules 2013 and 2014, and saddle the Estate with *large unnecessary costs,* in a case where Appellant was denied jury trial or any trial, of the involuntary petition filed against him and where such costs could have been avoided in the absence of bankruptcy?

(2) Can such court foster additional large expenses on the Estate under 11 U.S.C. 503 and 11 U.S.C. 506 (b), which also could have been avoided without resort to bankruptcy?

(3) When a United States District Court, sitting as an appellate court under Sec. 405 (c) (1) (C) of Public Law 95-598, determines a bankruptcy appeal without hearing or transcript, can it be said that Appellant has been afforded proper review under the cited provision and *Matter of Perimeter Park Investment Associates, Ltd.* (CA 5th 1980) 616 F.2d 150, *151* ?

(4) Are the "equitable principles" governing bankruptcy, established by this Court in a line of landmark cases cited herein, still applicable under the Bankruptcy Code, or have these principles been abrogated by the enactment thereof?

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A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

In addition to the grounds specified in the last part of Rule 17.1.(a), jurisdiction is invoked for the primary reasons:

I

To afford this Court opportunity to declare guidelines for the proper scope of appellate review under the Bankruptcy Code, and determine whether a *no hearing-no transcript* Appeal is sufficient.

II

To afford this Court, through the facts of this case, additional justification for its decision in *Marathon,* supra, and illustration of the dangers in entrusting drastic power under the Bankruptcy Code, to NON-Article III Tribunals.

III

To afford this Court additional opportunities to declare guidelines for the United States Congress that seems to be having considerable difficulty in enacting remedies mandated by *Marathon,* supra.

To the extent that any declarations by this Court may enable Congress to prevent further abuses under the Bankruptcy Code, this petition will have served a most useful purpose.

IV

Most important of all, to afford this court opportunity to declare whether the "equitable principles" governing bankruptcy, established by this Court in a line of landmark cases, are still applicable under the Bankruptcy Code—in particular reference to whether the *large unnecessary disbursements* herein accord with those principles.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED-BASIS FOR FEDERAL JURISDICTION

This case involves Article III Sec. 1 of the Constitution of the United States. Reliance is had on 28 U.S.C. 2101(c) and Rule 20 sub-sections .2. and .4. of this Court as the basis for Federal Jurisdiction.

The primary statutes involved are 11 U.S.C. 327(a), 11 U.S.C.328(c), 11 U.S.C. 503, 11 U.S.C. 506(b), and Sec. 405(c) (1) (C) of Public Law 95-598.

Other statutes involved are 11 U.S.C. 101(13) and 11 U.S.C. 363(m).

A CONCISE STATEMENT OF THE CASE

Statement of the case has been made in *King v. Fidelity National Bank* (CA 5th 1983) 712 F.2d 188, *189, which matter is presently before this Court in Docket No. 83-1114,* and in unpublished opinion of the United States Court of Appeals for the Fifth Circuit, No. 83-3344 Summary Calendar—which latter opinion appears as item No. 2 in the Appendix separately presented under Rule 21(k).

As appears from the foregoing, an involuntary petition under 11 U.S.C. 303 was filed by the Fidelity National Bank against Petitioner King and his wife. On appeal to the Fifth Circuit, the wife was ordered dismissed from the proceeding.

During pendency of the appeal, the Trustee filed an application with the bankruptcy court to sell *at private sale* a 15.75 acre tract of land with improvements, belonging to Petitioner King and his wife, in Livingston Parish, Louisiana, which area can be considered part of the metropolitan area of Baton Rouge, Louisiana. (See: item 9 of the separate Appendix)

As more fully appears from said application, said sale was not to be at public auction to the highest bidder, but rather to one individual for the sum of $356,383.00, with a

6% commission *(or $21,383.00)* to be paid to a realtor at time of sale. Although predicated on the belief "that the price offered therefore is the best one available",**NO APPRAISAL OF THE PROPERTY** was submitted.

Trustee's application was dated April 15, 1982 and filed April 16, 1982. This appears the *only* application re this property to the bankruptcy court. **NO NEWSPAPER ADVERTISEMENT HAD BEEN MAKE BY TRUSTEE PRIOR THERETO.**

Following hearing on *May 13, 1982,* the bankruptcy court on May 14, 1982 authorized Trustee to sell the property *at private sale* to a designated individual for the sum of $356,383.00 with payment of a 6% realtor's commission *(or $21,383.00)* at time of sale. (Item 8-Appendix)

On *May 21, 1982* the court issued a supplemental order (No. 7-Appendix) reafirming a reservation to Citizens Savings & Loan Association to claim attorney's fees, and relegating such rights to the proceeds of sale, *irrespective of the fact that said Association had neither sought foreclosure nor placed its claim in the hands of the Association's law firm, prior to the filing of the involuntary petition.*

On appeal of these orders to the United States District Court for the Middle District of Louisiana, the court allowed neither hearing nor oral argument on appeal. The court's reasons for judgment affirming actions of the bankruptcy court are dated *March 29,1983* and appear as item 6 of the Appendix. The judgment of the court is dated *March 30, 1983* (Item 5-Appendix) while its Minute Entry denying amendment or reconsideration is dated *May 11, 1983* (Item 3). *Apparently the District Court disposed of the appeal and request for amendment or reconsideration without benefit of the Transcript of the May 13, 1982 hearing in the bankruptcy court.* Reference to the caption sheet of this hearing shows that it was not filed in the

District Court *until June 23, 1983!* (See: item 10 of appendix)

On Appeal to the United States Court of Appeals for the Fifth Circuit, that court affirmed in an unpublished opinion (No. 2 of Appendix) and again, in an unpublished opinion, denied rehearing on November 4, 1983. (See: item 1 of Appendix)

This application for Certiorari followed.

A DIRECT AND CONCISE ARGUMENT

Bankruptcy Rule 2014(a) provides:

> "(a) APPLICATION FOR AND ORDER OF EMPLOYMENT. An order approving the employment of....auctioneers, agents, or other professional persons pursuant to Sec. 327...of the Code *shall be make ONLY on application of the trustee...*, stating the specific facts showing the *NECESSITY* for the employment, the name of the person to be employed, the reasons for his selection....and, to the best of the applicant's knowledge, *all of the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants."* (Caps and italics ours for emphasis)

The Advisory Committee noted under the companion rule 2013 that:

> "A basic purpose of the rule is to prevent what Congress defined as "cronyism."

Obviously, Rule 2014(a) was not complied with herein. Pretermitting the technicality that Trustee's application pre-dated its effective date (Apx-item 9), 11 U.S.C. 327(a) *was* applicable, which provides:

> "(a) Except as otherwise provided in this section, the trustee, with the court's approval may employ one or more....appraisers, auctioneers, or other professional persons, *that do not hold or represent an interest adverse to the estate, AND that are disintereseted...."* (Caps and italics ours for emphasis)

In commenting on this section, COLLIER (15th Ed. V. 2 Par. 327.03 at page 327-10) states:

> "Under section 327(a), the trustee may employ only professional persons who are "disinterested" persons. *This effects a change from prior law.*
>
> * * * * *
>
> "Section 327(a) assimilates the employment of attorneys, acountants *and other professional persons* in cases under the Code. *The premise of this change is that the same standards for determining "disinterestedness" as well as the qualifications AND THE NEED for professional services should be applied with respect to...other professionals as are now applicable to attorneys and appraisers."* (Caps and Italics ours for emphasis)

A similar observation is made at page 327-8:

> "Under section 327(a), the trustee may employ only professional persons that do not have or represent an interest adverse to the estate."

Strangely enough, although Trustee's application sought authorization to sell at private sale to the designated purchaser "or to any other purchaser who may offer a substantially higher price" (Apx-item 9 Par. 5), *the order of court authorized Trustee to sell ONLY to the designated purchser!* (See item 8 of Appendix) Can a realtor be disinterested when his $21,383.00 commission is authorized ONLY to a designated purchaser at private sale? (See: Apx-item 8)

As long ago as 1910, the landmark case of *Gold v. South Side Trust Co.* (CA 3rd 1910) 179 Fed. 210, *211-212,* cert. den. 218 U.S. 671, 31 S. Ct. 221, 54 L. Ed. 1204, declared:

> "A brankrupt's property is always for sale, and so far as the estate is concerned, *the services of an agent ordinarily are in no way required, and the law designates the agent who shall make the sale, namely the trustee of the estate.....*
>
> * * * * *

"In this case it is difficult to see how the bankruptcy court would have authorized the commission claimed.

* * * * *

Any commission authorized would have to be paid out of the purchase money....or, if not, out of the general estate, an even greater injury to the unsecured creditors." (Italics ours for emphasis)

Does this Court believe that the Trustee showed necessity for a realtor, WHEN NOT A SINGLE NEWSPAPER ADVERTISEMENT RE THIS PROPERTY was made by Trustee at any time prior to the filing of his application, and order of court? See also: *Donovan & Schuenke v. Sampsell* (CA 9th 1955) 226 F.2d 804, *806, 810-811*:

"...neither the Referee nor the Trustee could personally have acted in these premises. WHAT THESE OFFICERS COULD NOT DO THEMSELVES, THEY COULD NOT AUTHORIZE ONE OF THEIR AGENTS TO DO LEGALLY." (Caps ours for emphasis)

* * * * *

"(6)....*Even if there were full disclosure, adequacy of consideration, absence of secret profit, an open judicial sale will not avail separately or in combination as a defense for such a fiduciary. THE PROHIBITION IS ABSOLUTE IN THE PUBLIC INTEREST. IT IS ESTABLISHED TO PROTECT THE COURTS THEMSELVES FROM SUSPICION OF CHICANERY."* (Caps and italics ours)

Most important of all is the observation from *Mosser v. Darrow*, supra, 71 S. Ct. 680, *684*

"(6) In fairness to the trustee, it is to be noted that there is no hint or proof that he has been corrupt or that he has any interest, present or future, in the profits he has permitted these employees to make. For all that appears, he was simply misled into thinking these

persons indispensable, but he entered into an arrangement which courts cannot sanction unless they are to open the door to practices which would demoralize trusteeships and discredit bankruptcy administration." (Italics ours for emphasis)

The decision herein appears impossible of being reconciled either with the forgoing, or the cardinal equitable principles enunciated by this Court. If, for example, the Trustee had had a broker's license and had received all or part of the realtor's commission, would not the *net end effect* be the same to the estate as the expenditure of the $21,383.00 commission to a third party? If, for example, the bankruptcy judge had had a realtor's license and had directed the $21,383.00 to be paid to him, would not the *net end effect* to the estate be the same? In the Middle District of Louisiana the bankruptcy judge *is allowed* to practice law. Why not the brokerage business? *IF*, from the rule of *Darrow* and *Sampsell*, supra, neither Referee nor Trustee can so what he has no right to authorize, does it not follow that *if* they have the right to authorize, they have the right to do direct?

We conclude this section in saying that the bankruptcy court condoned a blatant violation of 11 U.S.C. 327(a) in its orders appealed from. *Interestingly enough, 11 U.S.C. 327(a) is NOT mentioned in* (1) the Trustee's application (Apx-item 9) *or* (2) the bankruptcy court's order (Apx-item 8) *or* (3) the supplemental order (Apx-item 7) *or* (4) the Reasons for Judgment of the District Court (Apx-item 6) *or* (5) the Judgment (Apx-item 5))*or*(6) the District Court's Minute Entry of May 11, 1983 (Apx-item 3)*or* (7) the unpublished opinion of the United States Court of Appeals for the Fifth Circuit (Apx-item 2)*or* (8) that Court's unpublished Denial of Rehearing (Apx-item 1).

Thus, it seems safe to conclude that 11. U.S.C. 327(a) was totally ignored by all of the lower courts!

In this matter, the United States District Judge allowed neither hearing nor oral argument in support of the appeal. The same District Judge allowed neither hearing nor oral argument in support of the six (6) bankruptcy appeals that were the subject of King v. Fidelity National Bank (CA 5th 1983) 712 F.2d 188, and is the subject of Docket No. 83-1114 of this Court.

We cannot criticize the District Judge for this, for, the United States Court of Appeals for the Fifth Circuit afforded neither hearing no oral argument in support of the appeal in No. 83-3344 Summary Calendar—either on original opinion (Apx-item 2) or on rehearing (Apx-item 1)

One Salient differece, however, is that the District Court disposed of this appeal *without* the transcript of hearing of May 13, 1982, since it was filed in the District Court on June 23, 1983, (See: item 10 of Appendix) while the District Court disposed of this matter on March 29, March 30, and May 11, of 1983. (See: items 3, 4, 5, and 6 of the Appendix)

Again, our purpose is not criticism but to *implore* this Court to state guidelines for the scope of appellate review under Sec 405(c) (1) (C) of Public Law 95-598, a topic on which this Court has *not* spoken previously, and on which there is a paucity of jurisprudence. See: *In the Matter of Perimeter Park Investment Associates, Ltd.*, supra, (CA 5th 1980) 616 F.2d 150, *151.*

If oral argument had been allowed by the District Court and Court of Appeals, perhaps 11 U.S.C. 327(a) would not have been ignored!

On the issue involving reservation of a claim for attorney's fees on the part of Citizens Savings & Loan Association, our purpose is not to criticize Judge Posner who was bankruptcy judge for the Middle District of Louisiana from November 16, 1961, until February 29,

1980, and who has at all times pertinent been successively appointed a "re-employed annuitant" for the disposition of matters in cases over which he had presided. Quite the contrary, for, although the Judge's law firm represents the Citizens Savings & Loan Association, *neither he nor his law firm have taken any action whatsoever to secure either the reservation for attorneys' fees or the relegation of such claim against the proceeds of sale.* Interestingly enough, *OTHER* interests excluding the Judge and his law firm have sought this reservation and relegation.

Our purpose in raising this issue is to illustrate the harsh brutality against the estate of Petitioner King *if* 11 U.S.C. 506(b) is to be interpreted as authorizing such reservation and relegation, *when as a matter of state law no claims for attorney fees would have been allowed since neither foreclosure nor demand was made on Mr. King prior to the filing of the involuntary petition.* Pretermitting the allowance of 11 U.S.C. 506(b) in a case wherein an entity files a *voluntary* petition under 11 U.S.C. 301, or even a *joint petition* under Sec. 302, it seems a brutal inequity to inflict a 10% penalty or $12,586.67 on Mr. King's estate—in a case where he has been denied jury trial or any trial of the *in*voluntary petition under Sec. 303, *and especially where the Association's law firm has NOT sought reservation or relegation of such calim!*

Again, this Court has not had the opportunity, previously, to state its views on the proper interpretation of 506(b) and, again there is a paucity of guidelines in the existing law. COLLIER ventures the opinion (15th Ed. V. 3 Par. 506.05 at page 506-33) that 506(b) "is not a departure from prior case law" and concludes that the section "can be said to codify pre-Code case law." In addition, COLLIER in its 1983 Supplement to Vol. 3, under Par. 506.05 at page 506-34, cites the case of *In re Roberts* 6 C.B.C.2d 892 (B. Ct. E.D.N.Y 1982) as holding that:

"To increase the debtor's burden of debt by requiring

him to pay a creditor's attorney's fees without any statutory or contractual basis is totally inconsistent with the spirit and letter of the Bankruptcy Code."

See also: *In re United Merchants and Manufacturers, Inc.*, supra, (CA 2nd 1982) 674 F.2d 134, *138* Par. (4) wherein 11 U.S.C. 506(b) is mentioned with limited discussion.

Interestingly enough, neither Trustee nor any other entity dispute force of the authorities cited herein. The basic thrust of any opposition appears to be that since we were unable to procure a stay of the order of sale, under the latter portion of RULE 805 RBP:

"...Unless an order approving a sale of property...is stayed pending appeal, the sale to a good faith holder shall not be affected by the reversal or modification of such order on appeal..."

and/or 11 U.S.C. 363(m):

"The reversal or modification on appeal of an authorization....of a sale...does not affect the validity of a sale...under such authorization to an entity that purchased....such property in good faith."

Pretermitting the question of whether the purchaser was a good-faith purchaser under 11 U.S.C. 363(m), the ready answer to such thrust is that we are NOT seeking to nullify the sale. ALL THAT WE ARE SEEKING IS (1) TO FORCE THE TRUSTEE TO RECOVER THE $21,383.00 REALTOR'S COMMISSION AND (2)VOID THE RESERVATION OF ATTORNEYS' FEES! Unless we are afforded such rights, 11 U.S.C. 327(a) will be without meaning.

Indeed this case illustrates, together with its counterpart in No. 83-1114 of this Court, "a general plan which must be viewed as a whole with all its composite implications," *Buffum v. Peter Barceloux Co.*, supra, 53 S. Ct. 539, *541*, to such a degree that this Court should

summarily VACATE the Order for Relief and DISMISS the involuntary petition against G. Harold King. Jr.!

CONCLUSION AND PRAYER

This Court has said that "...equitable principles govern the exercise of bankruptcy jurisdication", *Bank of Marin v. England,* supra, 87 S. Ct. 274, *277* and that "courts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited", *Young v. Higbee,* supra 65 S. Ct. 594, *599* and that bankruptcy courts "are essentially courts of equity, and their proceedings inherently proceedings in equity", *Continental Illinois National Bank v. Chicago Rock Island,* supra, 55 S. Ct. 595, *606,* and indeed the Fifth Circuit has summed up these principles in *Matter of Multiponics,* Inc., supra, 622 F.2d 709 at page 721:

> "(19)...bankruptcy courts are courts of equity, *In re Mobile Steel Co.,* 563 F.2d at 699; *Local Loan Co. v. Hunt,* 292 U.S. 234, 240, 54 S. Ct. 695, 697, 78 L. Ed. 1232 (1934), guided by the principle of equality of distribution, *Sampsell v. Imperial Paper Corp.,* 313 U.S. 215, 61 S. Ct. 904, 85 L. Ed. 1293 (1941), but, at the same time, authorized to prevent courses of conduct otherwise fraudulent, abusive or unfair, 563 F.2d at 699; *Pepper v. Litton,* 308 U.S. at 304-05, 60 S. Ct. at 244, 84 L. Ed. at 287-88 (the equitable powers of the bankruptcy court "have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done"); Herzog & Zweibel, 15 Vand. L., Rev. at 85 ("the Courts will be guided by cardinal principles of equity jurisprudence to the end that injustice or unfairness is not done in the administration of the bankrupt estate.")..."

The foregoing principles were enunciated under the old Bankruptcy Act. This Court has not as yet decreed whether they are still applicable under the Bankruptcy Code. If applicable under the Code, they have been desecrated and smashed in the instant matter, for, by what principles of

equity or justice can an entity by forced into bankruptcy without jury trial or any trial then have his Estate saddled with large unnecessary costs that could have been avoided in the absence of an involuntary petition?

PETITIONER PRAYS that this Court grant the Writ of Certiorari and declare that these cherished principles are still mandated by the Bankruptcy Code.

We further pray that summary relief be afforded under the rules announced by this Court in: *Pan-American Life Insurance Co. v. Menendez Rodrigues* et al (1964) 376 U.S. 779, 84 S. Ct. 1130, *Aetna Insurance Co. v. Menendez* (1964) 376 U.S. 781, 84 S. Ct. 1131, *Standard Cigar Co. v. Tabacalera Sereriano Jorge*, S. A. (1964) 376 U.S. 780, 84 S. Ct. 1131, *First Houston Investment Corp. et al v. Wilson* (1979) 444 U.S. 959, 100 S. Ct. 442, 621 L. Ed2d 371, *Bush v. Lucas* (1980) 446 U.S. 914, 100 S. Ct. 1864, 64 L. Ed2d 268, and *Miller v. Castlewood International Corp.* (1980) 446 U.S. 949, 100 S. Ct. 2914, 64 L. Ed2d 806, and that the orders approving the realtor's commission and reserving attorney's fees be VACATED, with directions to the Trustee to recover the $21,383.00 paid as the realtor's commission.

We further pray that insofar as this Court reaffirms that the great equitable principle enunciated in *Bank of Marin v. England* and the other cases cited supra, are still applicable under the Bankruptcy Code, that this Court grant summary relief under the procedures of *Pan-American* and the related cases, supra, and (1) VACATE the order for relief entered against Petitioner G. Harold KING, Jr., and (2) DISMISS in its entirety, the involuntary petition filed against him under 11 U.S.C. 303, and thus (3) relegate all parties to other courts of proper jurisdiction, whether Federal or State, where issues may be determined under judicial safeguards and rights of adequeate review.

WE FURTHER PRAY for any and all additional

relief that this Court may deem appropriate in the circumstances.

Respectfully submitted
BY ATTORNEY

/s/ Franz Joseph Baddock

FRANZ JOSEPH BADDOCK

CERTIFICATE OF SERVICE

I certify that although Fidelity National Bank is listed as a party defendant/appellee in the caption of this matter before the United States Court of Appeals for the Fifth Circuit, that said bank has assumed the position that "the sole proper appellee is the Trustee, who controls the estate of the Debetors. 11 U.S.C. 323..." and that for this reason the sole appellee herein is CHARLES N. MALONE, Trustee.

Accordingly, I certify under Rule 28.5, that I have this date, by prepaid mail, forwarded three (3) copies of the forgoing Petition for Certiorari to Mr. CHARLES N. MALONE, Trustee, P.O. Box 3233, Baton Rouge, Louisiana 70821., and that all parties required to be served have been served under said Rule 28.5.

Nevertheless, to appraise all entities that may have interest in this matter, I further certify that I have served by prepaid mail,an information copy of the same Petition for Certiorari on Mr. DAVID S. RUBIN, Attorney, P.O. Box 2997, Baton Rouge, Louisiana 70821, Mr. MICHEAL. T. PERRY, Attorney, 5420 Corporate Blvd., Suite 302, Baton Rouge, Louisiana 70808, and on the CITIZENS SAVINGS AND LOAN ASSOCIATION, P.O. Box 1988, Baton Rouge, Louisiana 70821 - ATTN: Mr. MICHEAL A. ROY, Senior Vice President.

BATON ROUGE, Louisiana, this January 27 1984.

JAN 27 1984

/s/ Franz Joseph Baddock

FRANZ JOSEPH BADDOCK